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November 8, 1999

BY HAND

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Re: *Application by New York Telephone Co. (d/b/a Bell Atlantic-New York), et al., for Authorization to Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295*

Dear Ms. Salas:

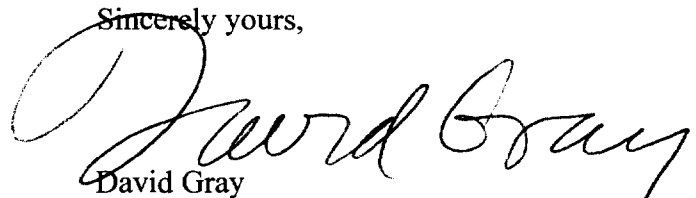
On behalf of U S WEST Communications, Inc. ("U S WEST"), enclosed for filing in the above-referenced proceeding are following submissions:

- 1) an original and six copies of U S WEST's Reply Comments in the above-referenced proceeding;
- 2) a copy of U S WEST's Reply Comments on disk, in Word 97 format.

Twelve copies of the Reply Comments have been provided to Ms. Janice Myles of the Common Carrier Division as well.

If there are any questions concerning the above matter, please communicate directly with the undersigned.

Sincerely yours,


David Gray

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application by New York Telephone)
Company (d/b/a Bell Atlantic-New York),)
et al., for Authorization To Provide)
In-Region, InterLATA Services in)
New York)
_____)

CC Docket No. 99-295

**REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.
IN SUPPORT OF BELL ATLANTIC-NEW YORK'S APPLICATION
FOR AUTHORIZATION TO PROVIDE IN-REGION, INTERLATA
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November 8, 1999

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INTRODUCTION AND SUMMARY

U S WEST Communications, Inc. ("U S WEST") hereby files its reply comments with respect to Bell Atlantic's application to provide in-region interLATA services originating within the state of New York. U S WEST has a direct, immediate, and concrete interest in this proceeding. U S WEST is one of the Bell Operating Companies ("BOCs") striving to obtain approval under section 271 of the Telecommunications Act of 1996 ("the 1996 Act" or "the Act") in order to provide in-region interLATA services. The Commission's application and interpretation of the section 271 competitive checklist in the context of Bell Atlantic's application may carry precedential weight with respect to future section 271 applications, including those that U S WEST intends to file.

The New York Public Service Commission has found that Bell Atlantic, by implementing the aggressive measures mandated by New York law, has satisfied a checklist that "goes well beyond the Telecommunications Act of 1996" and that local competition is flourishing in New York.^{1/} Indeed, a variety of consumer groups and two local competitors of Bell Atlantic (NEXTLINK New York, Inc., and Cablevision Lightpath, Inc.) have endorsed Bell Atlantic's application. U S WEST submits these comments to remind the Commission that, in evaluating Bell Atlantic's application, the Commission should make clear that each BOC seeking to obtain section 271 approval is free to -- and, indeed, required to -- make its own individualized showing regarding compliance with the checklist. Since individual BOCs in different states will confront distinct issues regarding their implementation efforts, the Commission should review all

^{1/} New York Public Service Commission, *Press Release: New York PSC Chairman Supports Bell Atlantic Long Distance Bid 1* (Oct. 19, 1999) ("New York PSC Press Release").

applications on their own merits, without converting the particular approach followed by any one BOC into a one-size-fits-all test for future applications.

DISCUSSION

The New York Public Service Commission has found that Bell Atlantic, in successfully meeting the more stringent requirements of New York law, has gone above and beyond what the 1996 Act requires. *See* New York PSC Press Release at 1. Bell Atlantic received a passing grade on 850 of 855 competitive factors evaluated by an independent third-party testing firm. *See Application by Bell Atlantic-New York for Authorization to Provide In-Region, InterLATA Services in New York*, filed Sept. 9, 1999, at 10-11 (“Bell Atlantic Application”). The company also has demonstrated its compliance with the New York PSC’s 122-factor Performance Assurance Plan (“PAP”) test. *See, e.g.,* Evaluation of the New York Public Service Commission 5, 6-8, 24-25 (Oct. 19, 1999)..

In evaluating Bell Atlantic’s application, however, the Commission should take care to confirm that Bell Atlantic’s efforts to meet the checklist in New York -- which are tailored uniquely to the competitive conditions and its overall operations in that state -- do not define a binding standard under section 271 that will be rigidly applied to judge future applications from BOCs serving other states. The Commission must be careful to avoid straying from the clear purpose of section 271: to require a BOC to demonstrate “compliance with the interconnection, unbundling, and resale obligations that are designed to facilitate competition in the local market” before a BOC is allowed to provide interLATA telecommunications in that

state.^{2/} As the detailed analyses set forth in the Commission's prior 271 orders attest, that demonstration necessarily entails a fact-specific inquiry into the specific operations of the applicant in a particular state, the competitive conditions prevailing in that state, the needs of local competitors, and the requirements of interconnection agreements approved by and other rules and regulations adopted by the relevant state commission.^{3/}

Accordingly, Bell Atlantic's compliance measures in New York should not and cannot be used as a benchmark for future compliance efforts by other BOCs in other states. Because of its density and size, the New York telecommunications market differs markedly from that of almost any other state. For example, New York bears no resemblance at all to any state in U S WEST's region.

- New York City is the most densely populated metropolitan region in the country, and in fact the population of New York City alone is greater than that of any state in U S WEST's region.^{4/}

^{2/} *Application by BellSouth Corporation, et al., for Provision of In-region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, at ¶ 3 (1998) ("Second Louisiana Order"); *see also Application of BellSouth Corp., et al., to Provide In-region InterLATA Services in South Carolina*, 13 FCC Rcd 539, at ¶ 19 (1997) ("South Carolina Order") (BOC's provision of OSS judged by "fundamental gauge of parity").

^{3/} *See, e.g., Application of Ameritech Michigan To Provide In-region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, at ¶¶ 164-188 (1997) ("Ameritech Michigan Order") (detailed analysis of Ameritech OSS in Michigan); *South Carolina Order* ¶¶ 90-95, 104-181 (same for BellSouth in South Carolina); *Second Louisiana Order* ¶ 94-160 (same for BellSouth in Louisiana).

^{4/} *See* Evaluation of the U.S. Department of Justice 8 (Nov. 1, 1999) ("DOJ Evaluation") (*citing* www.census.gov/population/estimates/metro-city/SC100K98-T1-DR.txt); Population Estimates Program, Population Division, U. S. Census Bureau, set forth at www.census.gov/population/estimates/state/st-98-3.txt ("Census Figures").

- Even excluding the population of New York City, the New York market is almost twice as populous as the largest market in U S WEST's region.^{5/}
- On the whole, the New York market is almost as large as the four most populated U S WEST states combined and is considerably larger than the combined size of the other ten states in U S WEST's region.^{6/}

The size and density of New York's population as compared to the states in U S WEST's region necessarily have a direct impact on the disparate telecommunications markets in those areas.

- Bell Atlantic operates almost 11.5 million switched access lines in New York -- more than U S WEST provides in twelve of its fourteen states combined, and roughly 70% of the total number of switched access lines served by U S WEST in its *entire region*.^{7/}
- The density of Bell Atlantic lines in New York is roughly four times the density of lines in U S WEST's region.^{8/}

These disparities have an obvious impact not only on the development of New York's telecommunications infrastructure, but also on the development of competition generally. The Commission recently found that CLECs "are entering the largest and densest markets first."

^{5/} See Census Figures.

^{6/} See *id.*

^{7/} Compare Federal Communications Commission, Preliminary Statistics of Communications Common Carriers tbl. 2.10 (1998) ("Preliminary Statistics") with U S WEST Access Line Statistics, set forth at www.uswest.com/is/factbook/97irhandbook/financial/access_lines.html ("U S WEST Statistics").

^{8/} U S WEST operates roughly 54 lines per square mile; by contrast, Bell Atlantic-NY serves roughly 213 lines per square mile. See Preliminary Statistics tbl. 2.10; U.S. Department of Commerce, *Statistical Abstract of the United States* 235 (1998) ("U S Statistical Abstract"); Response by U S WEST Communications, Inc. to FCC Universal Service Data Request, DA 97-1433, at Questions 1, 19 (submitted Sept. 12, 1997).

Federal Communications Commission, *Local Competition: August 1999*, at 5 (1999). That conclusion is plainly correct. Indeed, the Department of Justice has acknowledged that, even before passage of the 1996 Act, New York was a fertile ground for the development of competitive access facilities serving large customers.^{9/} The impact of market size and density on CLEC entry is borne out by the contrasts between New York and the states in U S WEST's region.

- CLECs are serving more access lines in New York -- 1.1 million switched access lines -- than are provided by U S WEST itself in nine of its fourteen states.^{10/}
- CLECs use their own facilities to serve more switched access lines in New York than U S WEST does in six of its states.^{11/}
- The density of CLEC lines in New York is greater than or comparable to the density of U S WEST lines in 8 states.^{12/}
- CLECs purchase more lines for resale in New York than in any state except California or Texas, and more than in all of U S WEST's region combined.^{13/}

^{9/} DOJ Evaluation at 10.

^{10/} Compare Bell Atlantic Application at 1 (CLECs serve 1.1 million access lines) with U S WEST Statistics (U S WEST operates fewer than 1.1 million lines in 9 of its states).

^{11/} Compare Bell Atlantic Application at 1 (CLECs operate 650,000 line using their own facilities) with U S WEST Statistics (U S WEST operates fewer than 650,000 lines in 6 of its states).

^{12/} See U S Statistical Abstract 235 (land areas of U.S. states); Bell Atlantic Application at 1 (number of lines served through CLEC facilities); U S West Statistics (number of lines in U S WEST's states).

^{13/} See *Local Competition: August 1999* tbl. 3.1.

- CLECs lease more unbundled loops in New York than in any other state and more than in all of U S WEST's region combined.^{14/}

The abundance of competition in New York is a market-driven phenomenon that is attributable to the existence of "high-volume, low-cost customers in urban business districts" that are "more attractive to new entrants than either rural or residential customers." *Local Competition: August 1999*, at 5. It is not simple to duplicate these conditions in less densely populated states.

In sum, CLEC operations in New York dwarf those in U S WEST's region and would, if transplanted to any U S WEST state, rival or exceed U S WEST's own operations. As a result, Bell Atlantic's wholesale operations in New York -- its external OSS systems and interconnection architecture, among other things -- must handle a volume of traffic vastly greater than anything imaginable in U S WEST's region. At the same time, Bell Atlantic in New York can (and indeed, must) take advantage of economies of scale and density that are simply unavailable to U S WEST and to BOCs in many other states. Thus, lessons learned and results achieved in New York cannot be applied indiscriminately to other states, especially those with more widespread and smaller populations (like the states in U S WEST's region).

The Commission therefore should resist the temptation to use this fact-specific proceeding to adopt generally applicable performance standards under section 271. The Commission should not require future applicants to prove compliance with the section 271 checklist by demonstrating point-by-point equivalence with the measures that Bell Atlantic has chosen to implement in New York. As the Commission itself has recognized, each 271

^{14/}

See id. tbl.. 3.3.

application is a unique proceeding that will turn not on absolute standards of performance but on the specific compliance efforts taken by the applicant in the relevant state.^{15/} Indeed, the notions of parity and nondiscriminatory treatment that underlie the competitive checklist are inherently relative measures that have relevance only by comparison to the particular operations of the applicant.^{16/} The Commission must also take into account market demands of both consumers and CLECs and the available infrastructure in evaluating “parity” in a specific market. More fundamentally, an adjudicatory proceeding (like this one) is not the appropriate context for fashioning one-size-fits-all standards: “rulemaking is generally a ‘better, fairer, and more effective’ method of implementing a new industry wide policy than is the uneven application” of policies in isolated adjudicatory proceedings.^{17/}

Accordingly, the Commission should be careful to avoid pronouncements of general applicability that would predetermine other carriers’ efforts to meet the checklist and obtain section 271 approval. As demonstrated above, states simply do not come in “one size.” Thus, one-size-fits-all rules are not appropriate when evaluating whether to grant section 271

^{15/} See *supra* n. 4; see also Letter from Chairman Kennard to Senators McCain and Brownback Att. B, at ii-2 (Mar. 20, 1998) (“Kennard Letter”) (“The Commission has not specified particular systems or interfaces a BOC must use to demonstrate compliance.”); cf. *Second Louisiana Order* ¶ 56 (“[T]here is often more than one type of evidence that an applicant can use to meet its burden of proof.”).

^{16/} See *Ameritech Michigan Order* ¶¶ 164-168 (rejecting on-time performance standard in favor of comparative measures); *BellSouth South Carolina Order* ¶¶ 118, 134 (same).

^{17/} *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983); see generally *Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3d Cir. 1974) (collecting authorities criticizing use of adjudication for formulation of new policy).

approval. What is *necessary* in New York -- or what may be required by the New York PSC above and beyond section 271^{18/} -- may not be *practicable* or even *desirable* from a CLEC's point of view in a state like Wyoming, Montana, or New Mexico. Conversely, CLECs in New York may not need what CLECs elsewhere find essential. The Commission has never interpreted section 271 to require any particular method of compliance^{19/} and has emphasized that review under section 271 is sufficiently flexible to accommodate any evidence that might prove helpful in a particular case.^{20/} The Commission should affirm those same principles here.

Finally, while Bell Atlantic's application suggests that its performance exceeds anything required by the 1996 Act,^{21/} the Commission should recognize that its precedents have expressly rejected the requirement of a near-perfect record as a legitimate standard under section 271. *See, e.g., Ameritech Michigan Order* ¶ 278 ("holding Ameritech to an absolute-perfection standard is not required by the terms of the competitive checklist").^{22/} A BOC's obligation to

^{18/} See New York PSC Press Release at 1.

^{19/} See Kennard Letter, Att. B, at ii-2.

^{20/} See *Second Louisiana Order* ¶ 59 ("[W]e reiterate that we remain open to approving an application based on other types of evidence if a BOC can persuade us that such evidence demonstrates nondiscriminatory treatment and other aspects of the statutory requirements."); see also *id.* ¶ 56.

^{21/} As Chairman Helmer of the New York PSC has noted, "what we [the New York PSC] have required in New York goes well beyond the Telecommunications Act of 1996." New York PSC Press Release at 1.

^{22/} See also Separate Statement of Commissioner Powell on *Second Application of BellSouth to Provide In-Region, InterLATA Services in Louisiana 2* (Oct. 13, 1998) ("[T]he evidentiary standards governing our review of section 271 applications are intended to prevent (continued...)

satisfy the checklist is intended to ensure parity among BOCs and CLECs so that the competitive playing field in a local market will be reasonably level before the BOC is permitted to offer in-region interLATA services. *See* Letter from Chairman Kennard to Senators McCain and Brownback, at 2 (Mar. 20, 1998) (“Nondiscriminatory access requires BOCs to show that ‘parity’ has been achieved, not ‘perfection.’”). It is not intended to place a BOC’s competitors at an advantage by requiring the BOC to provide them with perfect or near-perfect service.

CONCLUSION

U S WEST joins with the vast majority of commenters in acknowledging the magnitude of Bell Atlantic’s compliance efforts, and agrees with the New York PSC that Bell Atlantic, by meeting the obligations imposed under New York law, has done more than is required by section 271.^{23/} However, Bell Atlantic’s efforts in New York do not reflect the standard for checklist satisfaction in other states. Just as Bell Atlantic had the flexibility to work with the New York PSC and the Department of Justice to implement sections 251, 252, and 271 in ways that suited New York, so too every BOC, in every state, should have the freedom to satisfy section 271 using measures that are appropriate for market conditions in each state.

^{22/}

(...continued)

the perfect from becoming the enemy of the good.”); New York PSC Evaluation at 8 (“the 1996 Act does not mandate perfection”).

^{23/}

U S WEST also believes that more competition in long distance markets will always benefit consumers, and therefore concludes that Bell Atlantic’s ability to offer in-region interLATA services in New York will serve the public interest.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lynn R. Charytan", written over a horizontal line.

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November 8, 1999

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 8th day of November, 1999, I caused true and correct copies of the foregoing Reply Comments of U S WEST Communications, Inc. to be served by hand via messenger (where indicated) or by first-class mail, postage prepaid, upon the parties on the attached service list.


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